COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L.c. 159, §§ 12 and 16, into Verizon New England d/b/a Verizon Massachusetts' provision of Special Access Services	)	D.T.E. 01-34

INITIAL BRIEF OF
XO MASSACHUSETTS, INC.

I. INTRODUCTION

In response to CLEC complaints of significant problems with Verizon Massachusetts Inc.'s ("Verizon") performance in the provisioning and maintenance of special access service lines, the Department opened this proceeding in March, 2001. The Department recognized that the ability of CLECs to serve their customers is materially and adversely affected by Verizon's provisioning and maintenance of such special access service lines. Vote and Order to Open Investigation, March 14, 2001, p. 2. Although it has taken considerable time and effort even to obtain the applicable data, the Department now has before it considerable information and data regarding Verizon's provisioning and maintenance of such special access service lines. XO Massachusetts, Inc. ("XO") asserts that the record clearly shows discrimination by Verizon, favoring retail customers over wholesale customers, in terms of the time in which special access services may be obtained, as well as the lack of competition with respect to provision of special access services. Even Verizon admits that the data shows a shorter time for retail customers to have their orders filled than for wholesale customers,

though it seeks to hide such discriminatory treatment behind the differences in details of the wholesale and retail ordering processes. As discussed below, that excuse does not hold water. Further, the record shows additional discriminatory actions by Verizon with respect to forcing CLECs to take special access services rather than UNE's. Thus, while this case has focused more on Verizon performance on special access services, the Department also must simultaneously address the circumstances under which CLECs take special access services.

Also, as developed on the record in this proceeding, Verizon dominates the market for special access services and CLECs generally have no alternative other than taking such services from Verizon. It is critical that Verizon be required to provide special access services on a basis comparable to its provision for retail customers and not force CLECs to take Special Access Services, rather then a comparable alternative (UNE loop or transport). Unfortunately, Verizon does just that. The WorldCom witness provided evidence of the problem as follows:

> Incumbent LECs have been known to engage in anti-competitive tactics, such as claiming no capacity exists to provision a loop or transport circuit as a UNE but then having facilities available when the carrier-customer orders the same circuit under the incumbent's more expensive interstate special access tariff. For example, the Michigan Court of Appeals recently upheld a $3.75 million fine imposed by the Michigan Public Service Commission against Ameritech for refusing to provide unbundled local transport to a WorldCom subsidiary. Ameritech claimed it lacked facilities necessary to fulfill WorldCom's order, and that there was no requirement under the Telecommunications Act to add facilities. The evidence showed that while Amertech refused to install additional equipment to fulfill WorldCom's orders, it readily did so to serve its own customers or to fill WorldCom's orders for higher cost Special Access service.
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> Exhibit WCOM-1, pp. 5-6.

Verizon even admits this practice. Earlier, in the motion phase of this proceeding, XO had raised the concern that Verizon had adopted a policy whereby it claimed UNE-loops were unavailable, thus forcing CLECs to go to Verizon for Special Access Services. Although

Verizon denied that such a practice was improperly anti-competitive, it certainly did not deny either the existence of such practice, or any effects on CLECs of such a practice. *See* XO Response dated September 28, 2001, and Verizon response dated October 5, 2001.

Other PUCs have addressed this problem. The Illinois Commerce Commission ("ICC") investigated whether Ameritech was applying special construction charges in a discriminatory or preferential manner with regard to its retail customers and competitive local exchange carriers ("CLEC") purchasing unbundled network elements ("UNE").[1] The ICC did find that Ameritech was applying special construction charges in a discriminatory and preferential manner and ordered Ameritech to update all of its tariffs with the new definition for when a facility is available.[2] The ICC staff maintained, "that permitting Ameritech to impose its own definitions allows it to unilaterally alter its obligation to provide unbundled loops" and "asserts Ameritech has an incentive to interpret this term in ways that limit its obligation to provide UNEs." *Id.* at 13 (emphasis added). The ICC concluded, "Ameritech has an incentive to narrowly define 'available' so as to impair CLEC's ability to compete." *Id* at 18 (emphasis added). Concerned about Ameritech's ability to unilaterally modify its definition of "available", the ICC ordered Ameritech to add the definition to its tariffs. *Id.* at 19. In doing so, the ICC ensures "interested entities may count on the continuity of the definition and will have an opportunity to comment on any proposed revisions." *Id.* The definition adopted by the ICC is "a facility is available if it

[1] Just as Verizon often argues, Ameritech claimed that UNE and retail services are never comparable. The ICC disagreed. Relying on language in the FCC's order approving Verizon's New York 271 application that under certain circumstances UNEs have retail analogues, the ICC concluded "as a general proposition, UNEs and retail services may be comparable. ICC Order at 96. In order to maintain its requirements to serve customers in a non-discriminatory manner, Ameritech and Verizon can be required to construct for a UNE order if it does so for a retail order.

[2] *Illinois Commerce Commission on Its Own Motion v. Illinois Bell Telephone Company Investigation of Construction Charges,* Case 99-0593, August 15, 2000.

'is located in an area presently[3] served' by Ameritech." *Id.* at 20. The ICC concluded this definition is consistent with the Telecommunications Act of 1996 and FCC orders. *Id.*

This fact that Verizon rejects UNE orders for "no facilities" forcing CLECs to Special Access Services makes it all the more important for the Department to issue a decision that is reasonably likely to lead to a solution to the recognized problem. *See* section VI. *infra*.

II. PROCEDURAL HISTORY

On March 14, 2001, the Department opened this investigation into the provision of Special Access Services by Verizon. In particular, the Department was responding to complaints by CLECs that Verizon's performance in such regard was so deficient that it hindered their efforts to provide services to customers. Considerable time and resources were expended in addressing the motions of various parties, either to expand the proceedings or to restrict the scope of the inquiry and the information that Verizon had to provide. Ultimately, the Department rejected Conversent Communications' request for standard intervals for Verizon's provisioning of high capacity loops and for changing existing C2C Guidelines. Hearing Officer Ruling of June 20, 2001. On August 9, 2001, the Department rejected AT&T's motion to have the scope of the proceeding expanded to review Verizon's performance regarding interstate special access services provided under Federal tariffs, but stated that Verizon had to provide data on such performance so that the Department would have an adequate basis upon which to assess Verizon's performance regarding intrastate special access services. Verizon then moved for partial reconsideration and/or clarification of that order -- again asserting the Department's lack of jurisdiction even to review data on Verizon's performance under Federal tariffs. On October 25, 2001, the Department denied Verizon's motion.

[3] "The term 'presently' refers to the time at which a facility is requested."

Beginning in October, 2001, the Department held technical conferences and the parties conducted discovery. Due to delays in provision of requested information by Verizon, hearings were only conducted in May 2002. This brief is filed in accordance with the revised procedural schedule.

III. DESCRIPTION OF SPECIAL ACCESS SERVICES AND CLEC USE THEREOF

Special access services employ dedicated facilities that run directly between the end user and the carrier's POP or other facilities facilities of the carrier. Exh.WCOM-1, p.3. Special Access Services are used by carriers to connect specific customers to long distance networks or for access to local telecommunications services and for carriers' interoffice transport. The circuits used for special access services are generally (as relevant to this proceeding) DS1 and DS3 facilities. These are basically the same facilities that Verizon sometimes makes available as unbundled network elements (UNE loop and transport). Exh. ATT-1, pp.1-4. Indeed, Special Access Services are functionally equivalent to loop and transport UNEs. It does not appear that any of these facts are in dispute. Among other things, equivalence is significant to the issue of when CLECs must take special access services, rather than UNEs.

Because of tariff restrictions on the use of UNEs (*see* Exh. AT&T-1, p. 3, fn.1) and Verizon's admitted denial of provision of UNE loops where it would have to allegedly engage in new construction, carriers seeking the loop and transport functionality described above, must rely on special access services. Verizon Response dated October 5, 2001, fn.2; Exh.WCOM-1, p. 5-6. Unrebutted record evidence shows that self provisioning is a feasible alternative only for a limited portion of the total circuits needed because of the many problems

attending a CLEC's own new construction; most notably the delays of permitting requirements and building access. Also, record evidence shows that certain regulatory restrictions and difficulties within the ILECs' local service request ordering processes decrease the usefulness of loop and transport UNEs. Exh. AT&T. p. 4; Exh. WCOM-1, pp. 6-7. Therefore, CLECs usually have to use special access services rather then loop or transport UNEs. Further, most of the time, they must rely on Verizon's special access services because of limited availability of special access services from non-incumbent carriers. *See* Section IV *infra*. Once CLECs go to Verizon for special access services, they usually take such services under Federal tariffs because of tariff requirements that if 10% or more of the traffic on a given circuit is projected to be interstate, the service cannot be taken from a state level tariff. The Department should keep these facts in mind in deciding this case -- and particularly the result that wholesale services that would otherwise be under state level tariffs (*i.e.* special access service with up to 90% intrastate usage or UNE loop or transport not available due to "lack of facilities') are forced to federal special access service tariffs. The Department should look past this effort to short circuit its jurisdiction and take the necessary steps to remedy the demonstrated problems.

IV. THE MARKET FOR SPECIAL ACCESS SERVICES IS DOMINATED BY VERIZON

Obviously, Verizon is the only carrier with a ubiquitous network. To some extent other entities have facilities constructed and available for CLECs to take special access services. However, the record evidence shows that virtually all such services can only be obtained from Verizon. This conclusion is shown by at least two unrebutted facts. The one competitive carrier for which data is on the record, WorldCom, has 90% of its "off-net" special access circuits (i.e. circuits that it does not provision itself) are provided by Verizon.

Exh. WCOM-2, p. 7. Further, evidence shows that carriers do not use self-provisioning for so much of their special access services that the "off-net" portion is not significant. WorldCom provides more than 50% of its special access services "off-net." *Id*. WorldCom is one of the largest CLECs. WorldCom would logically be one of the carriers best able to finance and construct its own facilities. Therefore, the only logical deduction is that most CLECs self-provision their own special access services for only a very small fraction of their needs. The situation is not likely to improve any time soon, where CLECs are now caught in a liquidity crunch with virtually no new construction occurring.

Further supporting the conclusion that Verizon is the dominant supplier of special access services is the fact that the other entities that provide special access services offer those services at prices discounted from the Verizon price. Exh.WCOM-1, p. 8. If Verizon were not dominant, it would have to compete on price. Note that no evidence on the record shows that such entities have significant market share. Further, Verizon's argument that many CAPs have tariffs filed with the Department so that competition must exist, is spurious. Everyone knows that many carriers have filed tariffs with the DTE, but are now in bankruptcy and/or out of the Massachusetts' market.[4]

Verizon has no answer to these compelling points. Instead, its only argument in rebuttal of these facts is that the FCC's pricing flexibility decisions [Memorandum Opinion and Order, CCB/CPD Nos. 00-21, 00-28 and BA 01-663], means that Verizon is not dominant with respect to special access services. However, the record shows that Verizon did not really make, (or have to make) a showing of non-dominance to obtain pricing flexibility. Further,

the record shows that the market is not competitive in terms of Verizon's pricing (no decreases) and Verizon's performance regarding special access (inadequate). The only conclusion that can result is that Verizon is the dominant carrier. Exh. AT&T-2, pp. 19-21.

This unassailable conclusion means that Verizon's special access services need to be regulated. Despite some efforts by the FCC to decide what regulation to the detriment of Massachusetts consumers.

V. VERIZON DISCRIMINATES AGAINST WHOLESALE CUSTOMERS IN PROVISIONING SPECIAL ACCESS SERVICE

XO does not intend to argue at length the issues so extensively developed by the other parties, but does believe it to be useful to review the facts and discuss the implications thereof on a non-detailed basis. The record is replete with data showing that the provisioning times for wholesale orders for special access services are much longer than for retail orders. Specifically, Exhibit AT&T-2, Chart 1 shows the relative times (average interval completed) being a 31 days longer in January 2001, 23 days longer in March 2001, 22 days longer in July 2001, and 16 days longer in October 2001.[5] On a percentage basis, retail performance bettered wholesale often by 100-200%! Similarly, on time performance is consistently much better for retail than for wholesale: 99% on time - retail, 83% wholesale, on average for the data analyzed. Nor is this a statistical anomaly: Verizon's retail on time performance is better than wholesale in every month analyzed. Exh. AT&T-1, p. 10. Verizon's performance on the interval offered and maintenance for wholesale also significantly lag the same measures for

[4] Also note the Department's conclusion in its *Price Cap* order, D.T.E. 01-31, Phase I, p. 62, where the Department found "Verizon has not adequately supported its claim that the special access market is competitive on a state-wide basis."

retail. Verizon does not dispute the accuracy of these data, rather it seeks now to question their significance on the basis that the ordering processes for retail and wholesale are so different that the relevant data are not comparable.[6]

Although Verizon introduces reams of detail about the ordering processes, the record shows that the wholesale and retail ordering processes are, for the most part the same. Exh. AT&T-1 p. 5. With respect to the limited differences that do exist (the start date and sometimes the time of creation of the Service Order), the AT&T witness made the necessary adjustment to the data to reflect those differences. The result was still that retail performance was significantly better than wholesale performance. Specifically, the offered interval comparison on an adjusted basis to equalize the referenced process differences averaged 21.83 days for retail and 37.01 days for wholesale in calendar 2001. The data showed a range of wholesale intervals offered being more than twice as long as retail (January 2001) to a single month out of the twelve analyzed where the retail performance was only slightly better than wholesale (November 2001). Every other month showed better performance for retail (than wholesale) by about 40%. Exh. AT&T -2, Chart 1. With respect to the performance on interval completed, again on an adjusted basis to address Verizon's concern about non-comparability, Verizon's performance was also wholly inadequate. On average, adjusted retail was 25.6 days, while wholesale was 36.93 days. Even after June 2001, a point after which Verizon claims more equal processes, the data, as adjusted, still showed an advantage to retail

[5] It is noteworthy that Verizon fought hard to avoid providing this data in this proceeding. In light of the data showing significant retail advantage, that is not surprising and it should be remembered when assessing the merit of Verizon's arguments that the data does not yield meaningful comparisons of wholesale and retail performance.

[6] XO's experience has been the same as discussed by AT&T on the record. Exh. AT&T -2, p.6; Exh. WCOM-1, p.10 and Attachment C. Specifically, XO is often faced with a customer unhappy with the service due date XO provides based on the due date it receives from Verizon. The customer then calls Verizon retail for the same service

of about a week. Id. Thus, the record defeats Verizon's excuse for the significantly weaker performance with respect to intervals offered and completed.

Verizon's excuse for the retail advantage on on-time performance is again process differences, but a careful review of those processes shows that is not a sufficient explanation. Exh. AT&T-2, pp. 14-16. Whatever the reason, the discriminatory results are a fact -–– one that must be corrected. The Act requires non-discrimination between wholesale and retail services. Therefore, the ordering processes, or other sources of discrimination, must be modified to assure retail/wholesale parity. Also, the data shows that installation quality for wholesale customers significantly lags that for retail customers, where there is consistently a higher failure rate within the first 30 days of service for wholesale customers than for retail customers. The failure rate is usually about twice as much for wholesale, as compared to retail, but it got as high in the study period (calendar 2001) as 900% 2001(December 2001) worse failure rates for wholesale compared to retail. Exh. AT&T -2, p. 18.

The record also shows some reasons why the retail performance is better than the wholesale performance. Retail representatives have knowledge and access to Verizon legacy systems and the ability to get quick responses out of the common retail/wholesale ordering system, RequestNet, to find facilities for customers that might not otherwise be found and to do so more quickly. Also, apparent preferences in the level of staffing, training and other factors lead to the retail account teams being able to provide the retail customer service faster than wholesale customers. Exh. AT&T-2, p. 17. This is certainly an issue that bears further

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and is given a due date far better than the Verizon due date given to XO. This obvious retail/wholesale discrimination does nothing to further competition and does everything to maintain Verizon's monopoly.

monitoring and review and to the extent it continues to be a problem, it requires prompt remedy.

VI. REMEDIES

The record evidence confirms the existence of the problems that the Department sought to address in opening this proceeding. Unfortunately, the record shows additional related problems of Verizon denying that facilities are available when that might not be the case, or at least where minor efforts such as line conditioning could remedy the problem. Despite Verizon's claims of preemption by the FCC, there are several actions the Department can and must take.

First, regarding the issue of the ILEC forcing CLECs away from taking loop and transport UNEs to take more special access services than they would otherwise, the Department should take one of two actions. First, the Department could follow the lead of the New York Public Service Commission ("NYPSC") and the task force that it convened in Case 00-C-1945 and, at the least, require a streamlining of the ASR process so that when CLECs order loop and transport UNEs that Verizon rejects due to lack of facilities, the CLEC order is automatically converted to a Special Access service order and considerable time is saved by avoiding the rejection and reorder process. The Department should even review Verizon's "no facilities" policy to ensure the policy is appropriate, complies with the current law, and cannot be changed unilaterally by Verizon. A clearer definition of "no facilities" in Verizon tariffs, such as that required by the Illinois Commission would be most helpful. While this issue has certainly been raised in this proceeding, it has not been fully developed, so that the Department

might prefer the alternative approach of fleshing out the problem further. If that is the case, the Department should open a Phase II to explore the problem and to determine what course of action is best, or perhaps establish a task force such as was done in New York. In either case, the mission should include the issues presented to the New York task force, namely:

?? Define "no facilities"[7]
?? Define "construction"
?? Create no facilities response procedure
?? Streamline order process for no facilities
?? Verification of no facilities
?? Engineering restrictions[8]
?? Dispute resolution

If Verizon's UNEs provisioning policy is corrected to conform with current law so that fewer UNEs are rejected, Special Access Services become less of an issue for CLECs and is not the bottleneck it is today.

With respect to the issue of the discriminatory treatment of CLECs by Verizon in ordering of Special Access Services, it is also necessary for the Department to take strong action. First, there must be reporting requirements for Verizon so that its ongoing performance can be monitored. To the extent that problems continue to exist, at the least, the Department should coordinate with the FCC to ensure that Massachusetts consumers are protected by appropriate enforcement and penalties. Some of the potential process improvements identified in this proceeding already should also be required.

[7] Participants should be expected to make the legal arguments to support its position whether the definition should be changed.
[8] This issue comes up when Verizon rejects a UNE order because fiber is not available although copper is available but Verizon engineers "require" the service to be provisioned on fiber. If copper is suitable for a service, CLECs should have the option of using copper. In the retail environment, through its access to RequestNet, a Verizon representing can deal with the fiber/copper issue so that an order can continue to completion. See Exh. AT&T-2, p.17.

CONCLUSION

For the reasons set forth in this brief and on the record in this proceeding, the Department should adopt the suggested remedies to seek to resolve the obvious problem of inadequate wholesale provisioning of special access services and improper forcing of CLECs to take Special Access Services in place of loop and transport UNEs.

Respectfully submitted,

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Date: June 20, 2002

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